No. 21,900

In the

United States Court of Appeals

for the Ninth Circuit

OTIS CROOKER,

Appellant,

vs.

WARREN GRAFT,

Appellee.

Appeal from the United States District Court for the District of Montana, Helena Division

Brief of Appellant

(Oral Argument Requested)

SMALL & CUMMINS
and
CARL A. HATCH
300 Fuller Avenue
Helena, Montana

Attorneys for Appellant

SORG PRINTING COMPANY OF CALIFORNIA, 346 FIRST STREET, SAN FRANCISCO 94105

SUBJECT INDEX

TABLE OF AUTHORITIES CITED

Cases

Statutes

Texts

No. 21,900

In the

United States Court of Appeals

for the Ninth Circuit

OTIS CROOKER,

Appellant,

vs.

WARREN GRAFT,

Appellee.

Appeal from the United States District Court for the District of Montana, Helena Division

Brief of Appellant

(Oral Argument Requested)

STATEMENT OF PLEADINGS AND FACTS

Warren Graft, appellee, a resident and citizen of the State of California, brought this action in the United States District Court for the District of Montana, Butte Division, against Otis Crooker, appellant, a resident and citizen of the State of Montana. Jurisdiction of the court was based upon Title 28, Section 1332, U.S.C., Mr. Graft having alleged that the parties were citizens of different states and the amount in controversy exceeded $10,000.00, exclusive of costs and interest. (Complaint, paragraph 1).

Mr. Graft, the owner-pilot of a Cessna 180 single-engine, high wing, four-passenger aircraft with amphibian landing gear, (Tr. 17), flew to Ennis, Montana, in late July, 1962, on a fishing trip (Tr. 19, 22). A friend, Dexter Whitcomb, rode with him (Tr. 22). The rear seat of the plane was removed to provide space and weight-carrying capacity because, as Mr. Graft stated, "I knew—where we would be operating and I wanted all the reserve power and weight-carrying capacity that I could get. . . ." (Tr. 22).

Mr. Graft landed at Ennis on *a private landing facility* owned by Otis Crooker, who operated a resort, "The Sportsman's Lodge," adjacent to the airstrip (Tr. 6, 7, 178). The landing strip was built by Mr. Crooker for his own use, but it was open to the public (Tr. 7, 178) as an accommodation to the community. Many of those who did use it did not patronize Mr. Crooker's resort facilities, but went elsewhere in the vicinity for accommodations (Tr. 180). In 1962, when Mr. Graft landed on the strip, no landing fee was charged to anybody landing there (Tr. 179). Mr. Crooker had oil and fuel for sale, but no mechanics or attendants were employed there. The pilots had to look after the needs of their aircraft themselves (Tr. 179).

The premises on which Mr. Crooker maintains his airport facilities is a block of land approximately 300 feet wide and 3,000 feet long (Tr. 182, 183). The runway, that portion of the field graded to smooth it down and mowed to keep the weeds down, begins at its eastern edge and is approximately 135 feet wide for the entire length of the premises (Tr. 185). The runway was laid out in straight lines by a surveyor (Tr. 184) and is composed of similar material as the surrounding terrain, gravel and dirt (Tr. 7). Through the years a gravel berm had piled up along the edges of the runway due to the grading. This berm is the only physical

structure defining the boundaries of the runway (Tr. 10, 195). The Montana Airport Directory published by the Montana Aeronautics Commission (Defendant's exhibit 22) stated that the boundaries were undefined (Tr. 195).

The remaining portion of the airport premises west of the runway is a rough field that has never been used nor maintained for landings and take-offs (Tr. 185, 186, 195, 196, See Plaintiff's exhibit 15). It is prairie terrain, like the surrounding country. At the time of this accident, because of vehicular traffic upon it from persons driving cars and trucks over it, particularly the northern two-thirds, there were markings showing the wear from that traffic (See Plaintiff's exhibits 4, 15). The southern one-third of the rough, unusable area had no wear from traffic, except for the trucks and cars coming to inspect the accident; consequently, the weeds and berm were sharply distinct. (See Plaintiff's exhibits 4, 6, 7, 15, 21).

In May of 1962, two months prior to this fishing trip, Mr. Graft had been to Ennis and had landed and taken off from Mr. Crooker's strip at least twice. At that time his plane was not equipped with amphibian landing gear (Tr. 96), that having been put on for his summer charter work (Tr. 98). In July, when he decided to return to Ennis to fish, he knew that he would be landing on a rough, unmarked field, but he did not remove the amphibian gear even though it was a relatively simple two or three-hour operation (Tr. 98). He did not note any substantial differences in the field in July from when he observed it in May (Tr. 97). Mr. Crooker had no restrictions about what kinds of planes could land on his field. He described the strip as "kind of like a public highway, they use it at their own will. The pilot would be the man in command of the aircraft, makes all the decisions." (Tr. 189). Mr. Graft experienced no difficulty landing the craft.

Slightly after daybreak on July 30, 1962, Mr. Graft made preparations to return to California (Tr. 26). He made the customary pilot inspection and check of his plane before take-off (Tr. 28, 31) and determined to take off from north to south because he felt the slight wind indicated that to be proper (Tr. 29), even though that direction was a slight uphill incline and into obstructions (Tr. 222). He wanted to use every bit of help he could get to get off the ground (Tr. 124). He estimated the weight of his load, including passengers, gear, gasoline, and oil, to be thirteen pounds under the allowable gross weight for the aircraft (Tr. 49). He did not take accurate weights, however, but was merely guessing from his experience (Tr. 103). He figured the baggage and gear to be only fifty pounds (Tr. 23, 103). Mr. Crooker, who stored the baggage and gear and had occasion to observe it, estimated it to be over two hundred pounds (Tr. 189). Mr. Graft did not check the temperature before his take-off (Tr. 113, 114).

Mr. Graft taxied to the north end of the field, made a final check of the aircraft, and started the take-off run (Tr. 31). His position on the field, he stated, was "right in the center" of what he presumed was the runway (Tr. 79, 116). Mr. Carkeek, a local flyer who was taking off at the same time, although viewing Mr. Graft's position on the runway from an angle, felt that he (Graft) was on "the active part of the runway." (Tr. 222).

Because the field was rough, Mr. Graft decided to make what is called a rough-field take-off—to get off the ground as soon as possible to avoid bouncing the airplane around excessively and straining the landing gear (Tr. 32). He raised the craft three or four feet off the ground, but apparently felt he was not picking up the speed necessary to clear the fences, power lines, and houses at the south end

of the field (Tr. 34). He thought that the power lines were sixty feet high; in reality, they were only thirty feet high (Tr. 125). Moreover, because of the clear air, he misjudged the power lines and houses to be closer than they actually were (Tr. 127, 128, 130). The optical illusion he experienced, his mistaken judgment about the height of the power lines, and the fact that the aircraft was not picking up the speed he felt was necessary to become safely airborne, caused him to abort the take-off (Tr. 33, 34, 128). He set the aircraft back on the field, making what he felt was a normal landing (Tr. 34, 129). Mr. Carkeek observed that he "touched back down on the active part of the runway, but to the west side of it." (Tr. 223). He had about half of the runway ahead of him to roll out (Tr. 34, 222), so he didn't think it necessary to use brakes (Tr. 130).

After rolling approximately five hundred feet, Mr. Graft felt a slight veering to the right (Tr. 34). Mr. Carkeek saw the aircraft take a slight angle to the right (Tr. 223). Mr. Graft felt obstructions hitting the wheels which slowed him down rapidly (Tr. 34). Suddenly he was dipping to the right and cartwheeling on the left wing, spinning around a half circle and facing the direction from which he came (Tr. 34). The plane came to rest about six hundred feet from the south end of the strip out in the rough field west of the runway (Tr. 35). The wheels on the floats were broken off, and the floats, wings, and fuselage were seriously damaged (Tr. 35).

Mr. Cantwell, an FAA flight operations inspector from Helena, Montana, investigated the accident. He observed the plane was "off to the west side of the runway, heading in the—in a northerly direction, and marks on the surface of the ground indicating that it had turned in that direction." Mr. Graft had gone off the runway—"the usable por-

tion where you could take an aircraft off safely." (Tr. 42). He was off the graveled area maybe ten or fifteen feet (Tr. 43). Mr. Cantwell saw distinguishable markings—scrapings—on the right hand side of the runway "at the point where the forward nose wheel on the float had given way." (Tr. 58). From that point it veered off the runway into the rough area west of the runway (Tr. 58). Mr. Cantwell's report and the drawing he made of the accident were based on information that Mr. Graft furnished him at the time (Tr. 74).

Mr. Carkeek didn't know what caused Mr. Graft to veer off, but he observed that Mr. Graft "did take a slight angle off until his right float hit this little berm of gravel over here on the edge of the runway. . . ." (Tr. 223, 246).

Mr. Crooker, in making a detailed inspection of the runway, found a scar which took a gradual angle to the right (Tr. 187). It was a gouge mark, made in the hard-packed gravel, much like a broom handle would make if it were dragged down the field (Tr. 188).

In his complaint Mr. Graft alleged that Mr. Crooker:

(a) invited the public to use his landing field and represented to the public that it was reasonably safe (Complaint, paragraph 4);

(b) had a duty to maintain the runway in a reasonably safe condition and to warn of any obstructions or hazards thereon (Complaint, paragraph 5);

(c) negligently maintained the runway (Complaint, paragraph 6), which caused plaintiff to wreck his aircraft thereon (Complaint, paragraph 7, 8).

Mr. Crooker in his answer:

(a) admitted that he was a citizen of the State of Montana, but denied that the matter in controversy exceeded the sum of $10,000.00 (Answer, Second Defense, paragraph I):

(b) admitted that he owned the private airport at Ennis, Montana, that it was maintained in conjunction with his resort, and that fuel was available for sale there (Answer, Second Defense, paragraph III);

(c) alleged that the airport was not designed to handle amphibian type craft (Answer, Second Defense paragraph III);

(d) denied any negligence in maintaining the runway and that any duty rested upon him to warn of hazards and obstructions (Answer, Second Defense, paragraph V);

(e) denied making any representation to the public that the landing strip was reasonably safe (Answer, Second Defense, paragraph IV);

(f) affirmatively charged Mr. Graft with contributory negligence as a proximate cause of the accident (Answer, Third Defense);

(g) affirmatively charged Mr. Graft with assumption of risk for landing the type of craft that he did on an unmarked field (Answer, Fourth Defense).

STATEMENT OF THE CASE

This case involves a question of property damages to a Cessna 180 aircraft equipped with amphibian landing gear which its owner-pilot wrecked on a rough, gravel and dirt, unmarked private landing field at Ennis, Montana, on July 30, 1962. The plaintiff, Warren Graft, felt that the defendant, Otis Crooker, should have marked the runway in some manner more obvious than it was, that the failure to so mark the runway was a failure, under the circumstances, to warn of hazards and dangers existing in the unusable portion of the landing field west of the runway. Mr. Crooker denied any negligence on his part and affirmatively charged Mr. Graft with sole responsibility for the damages and

with assuming the risks inherent in landing a plane with floats on a rough, unmarked field.

The case was filed in the Butte Division of the United States District Court for the District of Montana, but was transferred for hearing to the Helena Division. It was heard by the Honorable Russell E. Smith, District Judge, sitting without a jury, on January 23 and January 24, 1967. The Court made findings of fact and conclusions of law supporting plaintiff and ordered judgment to be entered awarding damages to plaintiff of $9,111.00, with costs. Defendant filed objections and exceptions to the Court's findings of fact and conclusions of law and moved for a new trial. The objections and exceptions were overruled and the motion for a new trial was denied. From the order denying a new trial and from the judgment awarding damages to plaintiff, defendant appeals.

SPECIFICATION OF ERRORS

(1) The District Court erred in finding appellant negligent in failing to warn appellee of obstructions on appellant's airfield and that such negligence was the proximate cause of appellee's damages.

(2) The District Court erred in finding that appellee's negligence in attempting to take off or in aborting the take-off in the manner in which he did was not the proximate cause of appellee's damages.

(3) The District Court's finding of fact that "at the south end (of appellant's runway) there was a noticeable berm of soil and substantial differences in the appearance of the weeds" is inconsistent with the District Court's conclusion as expressed in its opinion that appellee was not warned of obstructions on the appellant's premises "either by oral or written notice or by the appearance of the field."

(4) The District Court erred in finding that the negligence of appellant, (if any), was the proximate cause of this accident.

The above contentions are argued herein under the following propositions:

I. There Was No Negligence on the Part of Appellant.

II. There Is No Duty to Warn of Obvious Dangers About Which a Person Upon the Premises of Another Knows or Is Reasonably Expected to Discover.

III. Appellee Was Guilty of Contributory Negligence Which Was a Proximate Cause of the Accident.

IV. If Appellant Was Negligent, Such Negligence Was Not the Proximate Cause of This Accident.

ARGUMENT

I. There Was No Negligence on the Part of Appellant.

Appellant contends that the District Court erred in finding and concluding that he was guilty of negligence which was a proximate cause of the accident (Conclusion of Law No. III). By its Finding of Fact No. V, the Court states that "the boundaries between the usable and unusable parts of the airport are not marked by artificial monuments". This apparently was the principal basis of the Court's finding that appellant was guilty of negligence. However, it is to be noted that the District Court also found that "at the south end there was a noticeable berm of soil and substantial differences in the appearance of the weeds" separating the usable landing strip from the rough, unusable portion of the airport. It was at the south end of the airstrip (where this noticeable line of demarcation existed between the usable landing strip and the unusable

area to the west) that the accident occurred. It was here that appellee's plane, after the aborted takeoff, while rolling out in a southerly direction along the usable strip, veered off to the right until it struck the berm of soil and rock on the edge of the runway and was thereby thrown around onto the rough, unusable area to the west of the airstrip.

It is manifest that if appellee, after landing his plane on the usable strip, had continued his roll-out straight ahead down the strip instead of causing or permitting his plane to veer off to the right toward the rough, unusable area, this accident would not have occurred. As noted above, the District Court has specifically found that a "noticeable berm of soil and substantial differences in the appearance of the weeds" distinguished the usable landing strip from the rough, unusable area to its west, there in plain sight for plaintiff to see if he had been keeping a lookout ahead. This is clearly illustrated by exhibits 6 and 7, which were pictures taken by appellee himself. These conditions, as illustrated by the evidence and by the Court's findings, rather clearly contradict the Court's finding of negligence on the part of appellant because of his failure to mark the boundaries between the usable and unusable parts of the airport by "artificial monuments". Moreover, in this connection, it is to be noted that in the official Montana Airport Directory, the Ennis airport which is involved here is designated as an *unmarked strip* (Exhibit D22 and Transcript 125).

In twenty-one years of operation of this airstrip (Tr. 6), appellant has never had another plane run off the usable landing strip onto the rough area which adjoins it (Tr. 184 and 185) as the appellee did here.

The District Court concluded in its opinion here that "plaintiff was in no different position than a pilot who had arrived at that place on the runway without negligence and was rolling to a stop". This conclusion, appellant submits, is erroneous and wholly unjustified under the evidence in this case. The situation here was entirely different from that of a normal landing of a plane on that airstrip. Here Mr. Graft was aborting a take-off making an emergency landing, with all the human excitement and pressure that would naturally be incident to such a landing. It certainly was not a normal landing.

First, the plaintiff (appellee) admitted that he misjudged the heighth of the power lines that he would have to clear at the south end of the landing strip. He estimated the heighth of such power lines at sixty feet, when actually they were only thirty feet high (Tr. 125). He admits he aborted the take-off because he made the mistake of thinking the power lines were closer than they actually were (Tr. 127). He called it a "mirage or optical illusion" (Tr. 128), and he admitted that was the first time he had ever had to abort a take-off (Tr. 128). He also admitted that by reason of the foregoing factors when he aborted the take-off and landed on the strip, he thought he was a lot closer to the south end of the strip than was actually the case (Tr. 130). He was not sure about whether he applied his brakes or the extent to which he may have applied them (Tr. 130). Thus we see it is clear that appellee was suffering the stress and strain of an emergency landing because of what he called "an optical illusion". He thought he was much closer to the end of the strip than he actually was (Tr. 130). This obviously was the reason he started veering his plane to the right in its roll-out to avoid running into the fence at the end of the strip (Tr. 223) and in veer-

ing off to the right he hit the berm that marked the west boundary line of the usable strip and this is what caused the accident.

In the light of these facts it is difficult to comprehend how the District Court could conclude (as it did in its opinion) that "the aircraft does not appear to have been out of control nor was the roll-out in its initial stage different from that which might have followed a normal landing". On the contrary, appellant submits that the facts as established by appellee's own testimony, bring this case squarely within the observation made by the District Court in its opinion, as follows:

> "In the excitement and emergency of an unplanned landing, he might have executed a faulty touchdown. His negligence would have barred recovery for damages arising from any of these events."

Appellant contends that there was no negligence shown on his part which could have created any hazard to any pilot or plane attempting to make a normal landing on this airstrip, and this, we believe, is the basis of the error of the District Court's finding of any negligence on the part of appellant here. It might also be added that exhibits 3, 4, 8, 15, and 21, are pictures taken by appellee himself from the air, which clearly disclose the condition of this airport and of the distinction between the 135-foot airstrip and the remainder of the rough area comprising a part of the premises.

We submit that these exhibits clearly refute the claim of appellele that it was impossible to determine which was the usable landing strip or runway, as distinguished from the rough area to the west of it. Likewise, these exhibits rather emphatically fortify the testimony of appellant as well as that of the witnesses, Newby (Tr. 148), Carkeek

(Tr. 219-220), and Ford (Tr. 235), (all of whom were pilots, were familiar with this airstrip, and had flown planes on and off from it many times), that the usable strip or runway involved here was clearly defined and perfectly obvious to any pilot seeking to land upon such strip.

II. There Is No Duty to Warn of Obvious Dangers About Which a Person Upon the Premises of Another Knows or Is Reasonably Expected to Discover.

A land owner has no obligation to protect persons upon his premises against dangers which are known, obvious, or so apparent that those persons may reasonably be expected to discover them by looking out for themselves. See Prosser, *Torts,* § 78, p. 495. In such a case, the necessity of a warning by the landowner is obviated because of the very nature of the premises. *The warning is given by the condition and appearance the premises present.* As stated by the annotators in 38 Am. Jur., *Negligence,* § 97, pp. 757-8:

> "There is no liability for injuries from dangers that are obvious, reasonably apparent, or as well known to the person injured as they are to the owner or occupant."

In the Montana case, *Myles v. Helena Motors, Inc.,* 113 Mont. 92, 121 P.2d 549 (1941), an action was instituted by a customer against a businessman for injuries sustained on the premises of the businessman. The customer, while walking from the rear of the building to the office in broad daylight, struck his head on an automobile hoist that was in plain view. He said that he was watching the floor for oil. Said the Court at 113 Mont. 96:

> "It is our view that on the evidence in the case plaintiff has failed to show any negligence on the part of the defendant, and that, if the cause had been sub-

> mitted to the jury and a verdict returned in plaintiff's favor, it would have been the duty of the court to set it aside. The hoist in question was in plain view. It was daylight and the place was well lighted. It was not what may be denominated a hidden defect in any sense. The fact that plaintiff was obliged to watch where he stepped to avoid stepping in oil was no reason why he could not also observe the hoist that stood directly in his path . . . While, as owner of the garage, the defendant was under obligation to warn the plaintiff of any hidden dangers on the premises . . . *we fail to see where it owed any duty to warn plaintiff of the presence of the hoist which was as open and obvious to him as to the defendant.*" (Emphasis added)

In the case *Anderson v. Sears, Roebuck and Co.,* 223 Minn. 1, 26 N.W.2d 355 (1947), the plaintiff stepped off a six-inch riser to the floor level of defendant's store and was thrown off balance. The court affirmed the defendant's motion to dismiss the action on the merits at the close of the plaintiff's case, holding in effect that when the premises of a business establishment have upon them counters, merchandise trucks, and other essential merchandising equipment which are in full sight and within the observation of everyone, and do not threaten danger to those visiting the store on business, the merchant is not liable for accidents which result to a customer or invitee from his own carelessness and inattention to surroundings.

In a similar case in Kentucky, *J. C. Penney Co. v. Mayers,* (Ky.), 255 S.W.2d 639 (1952), the customer fell down a four-inch step to the sidewalk. A judgment for the customer was reversed, and she was held to have been negligent and the store not to have been negligent. The court followed the rule that, while generally, a store owner is under a duty to use reasonable care to keep his premises in a safe condition, nevertheless a customer, upon entering

the store, must make a reasonable use of his own faculties to observe and avoid dangers which are obvious. The court said that a business customer's right to assume that the premises are reasonably safe does not relieve him of the duty to exercise ordinary care for his own safety, nor license him to walk blindly into dangers which are obvious, known to him, or that could be anticipated by one exercising ordinary prudence.

The Kentucky court followed this same rule in *O. K. Tire Store #3, Inc. v. Stovall,* (Ky.), 392 S.W.2d 43 (1965), in which a customer came to the tire store to make a payment on his account and to have a tire checked. While he was watching an employee check the tire, he stepped backward into a five-gallon bucket of white sidewall cleaner containing lye, burning his leg seriously. The court said that there was no negligence on the part of the tire shop and that the customer was negligent as a matter of law for failing to see for himself the obvious danger.

A Missouri case arising in the eighth circuit, *Collette v. Crown Cork and Seal Co.,* 362 F.2d 458 (1966), involved an action by a pipefitter against a plant owner for injuries occurring when the pipefitter applied heat to a lacquer line and it caught on fire. The court, finding no duty to warn under Missouri law, when the plaintiff has reason to know the danger through his own observation, said that the dangerous condition need not have been so obvious that it was visible to the plaintiff pipefitter's naked eye to obviate the defendant plant owner's duty to warn. As long as plaintiff was aware or should have been constructively aware of the danger, the defendant was not negligent in failing to give any warning.

The Montana Supreme Court has just recently affirmed the rule that there is no duty owed to an invitee with respect to dangerous conditions if, under the circumstances,

it would be reasonable to expect that an ordinary person would observe the danger. *Regedahl v. Safeway Stores, Inc.*, —Mont.—, 425 P.2d 335 (1967), citing *Clark v. Worrall,* 146 Mont. 374, 406 P.2d 822 (1965).

In the case of *Eastern Airlines, Inc. v. United States* (DCNY), 132 Fed. Supp. 787, recovery for injury to an aircraft was denied where the airplane had, under emergency conditions, touched down at night about half-way down the airstrip rather than near its beginning, and because of slush and ice on the strip was unable to stop at the speed at which it was going and crashed through a structure about eight feet high located 175 feet past the end of the airstrip. The court found that the structure involved was reasonably designed and situated so as to present no hazard to airplanes. See further 8 Am. Jur. 2d, § 79, p. 702.

It cannot be doubted that in this case Mr. Graft knew, or in the exercise of reasonable care should have known, the dangers made obvious by the appearance of this airfield, and especially the dangers in driving a plane with amphibian landing gear on this rough, unmarked landing field. He can't claim that he was not familiar with the strip, having landed on it at least three times before the accident, and having taken off from it at least twice before. Certainly he saw what was in plain sight then and knew the location of the runway. Moreover, he cannot expect the court to believe that he, an experienced pilot, really thought and assumed that the entire 300-foot wide field was a runway which could be driven on safely anywhere. Even the airports of Montana's largest cities, Great Falls, Billings, and Helena, for example, have runways of only standard width—150 feet. (See Defendant's exhibit 22). If Mr. Graft had driven off the runway of one of those airports, no doubt he would have experienced the same trouble he encountered at Ennis.

The truth of this matter is simply that Mr. Graft did not appreciate what was made obvious by the surroundings and appearance of the premises. By not watching where he was going, or not having his craft under control, or not being able to control it, he drove off the runway and wrecked his plane. He should have known, if in fact he did not truly know, that a plane with an amphibian landing gear could not safely drive in the high weeds and bumpy, unsmoothed terrain west of the runway. Under the law he is charged with the duty to look and to see what is in plain sight. As a matter of law he must be held to have seen what looking would have revealed.

III. Appellee Was Guilty of Contributory Negligence Which Was a Proximate Cause of the Accident.

The District Court found that appellee was guilty of negligence in several particulars and in attempting to take off as he did. Thus, by its Finding No. VII, the Court states:

> "The failure of the aircraft to gain airspeed was not the result of an engine failure. The failure was due to the fact that that aircraft on that field, with that surface, at that elevation, with that load and at that temperature simply did not have the capacity to fly away. A careful appraisal of these factors before the takeoff would have indicated to the plaintiff what the takeoff did reveal, i.e., that the operation was risky."

However, the Court then concludes that such negligence of appellee was not a proximate cause of the accident. Appellant contends that such conclusion is erroneous and that the negligent acts and omissions of appellee specifically noted by the Court relative to the take-off were a part of the active, efficient and proximate cause of this accident, and without which the accident would not have occurred.

Moreover, in addition to the negligent acts and omissions of the appellee which were noted and mentioned by the Court relative to the initial take-off, the evidence clearly discloses that appellee was also negligent in several particulars relative to aborting the take-off. For example, he misjudged the heighth of the power lines at the end of the runway (Tr. 125) and he admits he aborted the take-off because he made the mistake of thinking the power lines were closer than they actually were. He called it a "mirage or optical illusion". (Tr. 127-128). Then, after landing his plane back on the runway at a point where he still had plenty of room for a normal roll-out if he had continued on straight down the runway (Tr. 33-34), he failed to continue rolling straight, but instead, caused his plane to veer off to the right until it struck the west edge of the runway and ran off into the rough (or unusable) area adjacent to such runway (Tr. 223).

The facts discussed above conclusively show that appellee's negligence, as the Court found, placed him in the position in which he found himself on the runway. They further show, appellant submits, that appellee failed to control his aircraft under the circumstances and to see what he would have seen had he looked, that he was drifting into the rocks and high weeds off the runway. This series of events began with appellee's faulty take-off and continued in unbroken sequence to the accident off the runway at the south end of the airport.

Appellant respectfully submits that the foregoing facts, which were apparently overlooked by the District Court, demonstrate rather forcibly that appellee was guilty of a continuous series of negligent acts and omissions which continued right up to the moment of the accident and which clearly contributed to the happening of such accident, if they were not, indeed, the sole cause of it.

In holding that although the appellee was guilty of contributory negligence, such negligence was not the proximate cause of the accident here, the District Court in its opinion made the following statement:

> "In short, had plaintiff not been negligent in getting his aircraft into the air, the accident would not have occurred. From this does it follow that plaintiff's negligence was a proximate cause of the accident?"

In support of this conclusion, the Court cites and relies upon the case of *Barry v. Sugar Notch Borough,* 191 Pa. 345, 43 A.240 (1899), where a violation of a speed ordinance brought plaintiff under a falling tree.

By its reliance upon this and other similar cases set forth in the opinion, appellant believes that the Court has illustrated the error of its thinking on this proposition. Indeed, appellant submits that the case referred to does not present a situation which is fairly analogous upon the facts to the instant case, to permit its use as an authority here. Indeed, in the same case (Barry v. Sugar Notch Borough), if the facts had been slightly different to the extent that a tree had fallen across a portion of a street or highway and was blocking the same, and the plaintiff had been guilty of speeding and by reason thereof, unable to avoid crashing into the fallen tree, it certainly would not be contended that the plaintiff was not guilty of contributory negligence which might have barred his recovery. A similar distinction, appellant believes, can be found as to all the other cases cited by the Court in its opinion here relative to this proposition.

Further, in connection with this question of proximate cause, there appears a rather extensive and applicable annotation in 100 ALR2d, beginning at page 942. At page 946 of that annotation appear the following pertinent observations:

> "After an appraisal of the authorities, the comment agreed with the conclusion that no definite principle can be laid down by which to determine the question of 'proximate cause,' but that the question '*is always to be determined on the facts of each case* upon mixed considerations of logic, common sense, justice, policy, and precedent. . . . The best use that can be made of the authorities . . . is merely to furnish illustrations of situations which judicious men . . . have adjudged to be on one side of the line or the other.'" (Emphasis added).

and so appellant says here that a fair and reasonable application of the foregoing principles to the facts in the instant case must necessarily lead to the conclusion that the appellee was, as the District Court has found, guilty of contributory negligence in a number of particulars and also that such contributory negligence was, without question, the proximate cause of this accident.

IV. If Appellant Was Negligent, Such Negligence Was Not the Proximate Cause of This Accident.

Assuming, but not conceding, that the District Court was correct in finding that appellant was in some degree negligent, we submit that any such negligence could not, under the law as established by Montana decisions, possibly be considered as a proximate cause of the accident involved here. In such situations the Montana Supreme Court has rather clearly pointed out that the negligence of appellant, if any, did nothing more than create a condition, as distinguished from a cause of the accident. Thus, in the case of *Staff v. Montana Petroleum Co.,* 88 Mont. 145, 291 Pac. 1042 (1930) it was held (quoting syllabus):

> "Where plaintiff's negligence does nothing more than furnish a condition by which injury is made possible, and that condition causes an injury by the subsequent

independent act of another person, the two are not concurrent and the existence of the condition is not the proximate cause of the injury."

". . . the contention of defendant that the explosion, under the conditions above referred to, was due to plaintiff's contributory negligence in failing to keep the service pipes in good repair may not be upheld, it appearing that the pipes were examined under direction of the city authorities by the very employee who caused the explosion by his negligence; further, that the striking of the match by such employee was the proximate or efficient cause, and that, *if plaintiff was negligent in allowing gas to accumulate in the cellar, her act in that regard was only a condition as distinguished from a cause.*" (Emphasis added)

In conformity with the rule laid down in the foregoing decision and other Montana cases cited therein, it is clear that any negligence on the part of appellant here must necessarily be considered as doing nothing more than creating a condition as distinguished from the efficient, active cause of such accident, which, as hereinabove pointed out, consisted of the negligent acts and omissions of the appellee, beginning with his negligence in assuming to take off (which was noted by the District Court), and continuing thereafter with his negligent acts and omissions relative to aborting such take-off, and which continued right up to the occurrence of the accident.

CONCLUSION

Based upon the facts and the law governing this case, the District Court erred in entering its judgment in favor of the appellee and in refusing to grant a judgment in favor of the appellant. That judgment should be reversed and judgment should be entered for appellant.

Respectfully submitted,

SMALL & CUMMINS
and
CARL A. HATCH

By FLOYD O. SMALL
300 Fuller Avenue
Helena, Montana

Attorneys for Appellant

CERTIFICATION

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the Rules of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

FLOYD O. SMALL
Floyd O. Small